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COMPLETION INSTRUCTIONS ON REVERSE SIDE OF THIS FORM

QUESTIONS ON THE COMPLETION OF THIS FORM SHOULD BE DIRECTED TO
SSG BILL PERRY/693-7110 (DTSA/IGA)



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United States Department of State

Washington, D. C. 20520

ASD/ISA
Has Seen

ACTION MEMORANDUM

S/S

TO: The Acting Secretary

THROUGH: T - Ambassador Reginald Bartholomew

FROM: PM - Richard A. Clarke

SUBJECT: Export of Manufacturing Oven to Iraq

ISSUE FOR DECISION

How should we react to the planned export of a manufacturing oven to Iraq?

ESSENTIAL FACTORS

A New Jersey company is about to ship to the Government of Iraq a manufacturing oven for melting and molding special metals. DoD is concerned that the oven, when used with other parts and materials, could help Iraq manufacture missiles. Iraq claims the oven is for making limbs for amputees. Commerce engineering experts have concluded that the oven in question is appropriate to the stated purpose (making prosthetic devices) and wholly inadequate for military production (nose cones, aircraft engine parts).

The export of the oven does not require a munitions license from the Department because these ovens are not on the Munitions List; it also does not require a validated export license from the Department of Commerce because these ovens are not on the Commerce Control List. (Until July 1, 1990 there were some COCOM controls applicable to high temperature ovens, but these controls have been lifted and would not in any event have covered an oven of this performance level). Therefore the oven can be shipped without a license.

DECL:OADR

DECLASSIFIED BY: Frank Machat
Director, Office of FOI,
Privacy and Classification
Review

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June 1, 1992

DISCUSSION

DoD has asked that we request Commerce to stop the export. Under the Export Administration Act of 1970 (EAA), the Commerce Department could not now require a standard license for this type of export that would be effective against an existing contract (i.e., effective retroactively). Under Section 6 of the EAA, however, the State Department could request that Commerce impose "foreign policy controls" to curtail the export of such ovens "to further significantly the foreign policy of the United States or to fulfill its declared international obligations." However, foreign policy controls are not effective against existing contracts.

• Munitions Control Applicability
Alternatively the State Department could place ovens of this type on the Munitions List, thereby making them subject to State Department export licensing jurisdiction under Section 38 of the Arms Export Control Act ("AECA"). Under our ITAR regulations, State must be willing to argue that the commodity is "inherently military in character." Assuming that the item is placed in the "miscellaneous" category of the Munitions List, State must also be able to argue that the item has "substantial military applicability" and that it "has been specifically designed or modified for military use." Since the standard for determining which items are covered by the Munitions List is based on the nature of the item rather than its intended end uses, we would be on tenuous ground placing the item on the Munitions List for this case only; we should be prepared to keep it there. Once these ovens are placed on the Munitions List, all such exports then require a license, which may be denied regardless of a previously existing contract.

There are significant drawbacks to placing such ovens (especially those never controlled by COCOM) on the Munitions List. The Munitions List has never been used to control the export of manufacturing devices of this character; such devices have always been under Commerce jurisdiction. A perception that State was abusing its authority under the AECA to impose export controls over items traditionally regulated under the EAA could pose serious difficulties for us in the Congress, where the EAA is currently being revised and where we have already had to fight hard to preserve State's discretion to regulate exports under the AECA. Administratively, placing the ovens on the Munitions List would require the State Department to review licenses for all such exports.

• Nuclear Reactor Controls
Export of these ovens is not subject to nuclear export controls since they are neither components of nuclear facilities regulated under Section 109 of the Atomic Energy

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Act, as amended, nor other items controlled by Commerce due to their significance for nuclear explosive or other sensitive nuclear uses. These Commerce controls consist principally of the "Nuclear Referral List" established pursuant to Section 309 of the Nuclear Non-Proliferation Act of 1978, which includes items that "could be, if used for purposes other than those for which the export is intended, of significance for nuclear explosive purposes," 15 C.F.R. Part 378.2. Commerce may also control items or technology intended directly or indirectly for specified nuclear explosive or sensitive nuclear end uses, 15 C.F.R. Part 378.3. The oven at issue here is not covered by the relevant regulations.

• International Economic Powers Act

Blocking the export might be accomplished if the President exercised his broad authority under the International Economic Powers Act, 50 U.S.C. S 1702, to regulate transactions in any property in which a foreign country has an interest. This, however, requires that the President first declare a national emergency involving an "unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States," 50 U.S.C. S 1701. Invoking this authority requires an executive order and previously has been used only in situations of a truly serious character, such as to govern transactions with Iran after the 1979-81 hostage crisis, and to govern transactions with Nicaragua during 1985-89, South Africa during 1985-86, Libya after 1986, and with Panama in 1988-89. It would be very unusual to invoke this authority to control a single transaction rather than a range of transactions with Iraq.

• Future Controls

We are already in the process of interagency review to develop a list of items previously subject to COCOM controls which are now uncontrolled and yet remain of concern for non-proliferation reasons. Ultimately we will request the Commerce Department to impose foreign policy controls on export of these items to Iraq (machine tools, electronic equipment, chemical/biological equipment). Such a proposal was already being prepared by the Proliferation PCC for completion later this month. Although the particular oven at issue here was never covered by COCOM rules and therefore would not fit within the proposal, the proposal would provide for broad controls over the export to Iraq of items of non-proliferation concern. We could accelerate this process by having you make appropriate telephone calls or send letters to Secretary Mosbacher and General Scowcroft. If you approve, we would prepare the necessary papers and talking points. In addition, we would prepare appropriate press guidance and briefing materials for concerned members of Congress.

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RECOMMENDATION

That we accept that there is no appropriate way to prevent the export of this particular oven to Iraq, but that we accelerate the Proliferation PCC's work so that foreign policy controls can be put in effect immediately on export to Iraq of various items of export to Iraq that are of proliferation concern.

Approve_____ Disapprove_____

Disapprove; take steps to place
the item on the Munitions List_____

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